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FEB 18 1993

February 18, 1992

Ms. Donna Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: **Petition of United States Cellular  
Corporation to Delete or Nullify the  
Effect of Footnote Three  
CC Docket No. 90-257**

Dear Ms. Searcy:

Transmitted herewith, on behalf of Rochester Telephone Mobile Communications ("RTMC"), is an original and four paper copies of a Motion to Strike the above-referenced Petition of United States Cellular Corporation to Delete or Nullify the Effect of Footnote Three.

Despite best efforts, RTMC is unable to provide microfiche copies herewith. RTMC requests waiver of Section 22.6(d) of the Commission's rules (the microfiche rule), and requests an additional three business days within which to submit the requisite microfiche.

Please do not hesitate to contact the undersigned counsel should you have any questions in this regard.

Sincerely,



William J. Sill  
Marianne H. LePera  
Counsel for the Rochester Telephone  
Mobile Communications

Enclosure

RECEIVED

BEFORE THE

Federal Communications Commission

FEB 18 1993

WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of

LA STAR CELLULAR TELEPHONE COMPANY

CC Docket No. 90-257

For a Construction Permit for  
Facilities Operating on Block B in  
Domestic Public Cellular Radio  
Telephone Service in the New Orleans  
MSA.

and

NEW ORLEANS CGSA, INC.

To Amend its Construction Permit for  
Facilities Operating on Block B in the  
Domestic Public Cellular Radio  
Telecommunications Service, Call Sign  
KNKA224, in the New Orleans MSA.

To: The Commission

**MOTION TO STRIKE  
PETITION OF UNITED STATES CELLULAR CORPORATION  
TO DELETE OR NULLIFY THE EFFECT OF FOOTNOTE THREE**

Rochester Telephone Mobile Communications ("RTMC"), by its counsel hereby moves to strike the above-captioned Petition of United States Cellular Corporation to Delete or Nullify the Effect of Footnote Three (the "Petition") as procedurally defective.

RTMC has standing to file the instant Motion to Strike.<sup>1</sup> RTMC has a direct economic interest in the outcome and disposition of the Petition, as the contested "footnote three" is an important component of a pending Petition to Deny, to which RTMC is a party. See Petition to Deny filed August 3, 1992, FCC File No. 11021-CL-P-

<sup>1</sup> To the extent necessary, RTMC hereby requests leave to file the instant Motion to Strike.

562-B-89 (the "NY 4 Proceeding").<sup>2</sup> Accordingly, RTMC's interests as a member of a dismissed competing applicant in the NY 4 Proceeding will be directly affected by the disposition of the Petition. See Orange Park T.V., Inc. v. FCC, 811 F.2d 644 (DC Cir., 1987) [competing applicants has standing, even if properly dismissed]; Coalition for the Preservation of Hispanic Broadcasting v. FCC, 893 F.2d 1349 (DC Cir., 1991) [frustrated applicants are parties aggrieved because they have a "concrete economic interest that has been preceptably damaged by the Commission's award [of a license to another competitor]."]. Moreover, RTMC believes that Federal Communications Rules have been violated in connection with the filing of the above-captioned Petition. See Baton Rouge MSA Limited Partnership, 6 FCC Rcd 5948 (Mob. Ser. Div., 1991 [Mobile Services Division rejected the challenge to standing of interested party who believed the Commission's rules had been violated]).

**I. THE COMMISSION LACKS JURISDICTION TO ACT ON USCC'S PETITION.**

The Commission can not take action on USCC's Petition because the Commission surrenders jurisdiction over a proceeding whenever a party appeals an order in such a proceeding to the Court of Appeals. On June 15, 1992, the Commission released its Decision which contains footnote three. See La Star Cellular Telephone

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<sup>2</sup> Indeed, United States Cellular Corporation ("USCC") considered the NY 4 Petition to Deny sufficiently important to their Petition so as to discuss the NY 4 Petition to Deny, and to provide a service copy of the USCC Petition to counsel for RTMC. See Petition at 7.

Company (the "La Star Decision"), 7 FCC Rcd 3762 (1992). USCC did not seek agency reconsideration of that decision. Instead, USCC and La Star Cellular Telephone Company each filed a separate Notice of Appeal of the La Star Decision with the United States Court of Appeals for the District of Columbia Circuit (Case Numbers 92-1291 and 92-1294). These appeals are presently pending before the Court of Appeals.

The filing of the Notices of Appeal with the Court of Appeals divested the Commission of jurisdiction over the matter. Title 47, Section 402(c) of the United States Code provides:

Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein . . . .

47 U.S.C. Section 402(c) (emphasis added). Thus, the Court of Appeals and not the Commission presently has jurisdiction over the matter. When review by the Court of Appeals is sought, "the FCC has no authority to conduct further proceedings without the court's approval." Greater Boston Television Corporation v. F.C.C. ("Greater Boston"), 463 F.2d 268, 283 (DC Cir., 1971), cert. denied, 406 US 950.

In order for the Commission to have authority to act now, the Court of Appeals would have to order a remand of the case to the Commission. See Id. ["[t]he reviewing court must order a remand if there is to be provision for further administrative consideration"]; McClatchy Broadcasting Company v. F.C.C., 239 F.2d 19, 23 (DC Cir., 1956) [if the Commission desired to substitute a new permit for one on appeal, it should have moved

that the case be remanded for that purpose].

In its Petition, USCC does not request that the Commission seek remand from the Court of Appeals.<sup>3</sup> Nevertheless, the circumstances surrounding USCC's Petition utterly fail to satisfy the criteria for a remand. Greater Boston instructs that "the clearest case for remand appears when there is an allegation of impropriety . . . such as improper influence on or contact with a commissioner. . . ." Greater Boston at 283. No such allegation of impropriety exists in the instant case. Remand could also be issued in the case of a change in circumstance, such as the death of a principal. See Fleming v. F.C.C., 225 F.2d 523 (DC Cir., 1955). However, "not every change in circumstances that would have been material, and taken into account by the FCC, if part of the administrative record, calls for remand by the court." Greater Boston at 284-85. Remand will be considered:

. . . where there has been a change in circumstances, subsequent to administrative decision and prior to court decision, that is not merely "material" but rises to the level of a change in "core" circumstances, the kind of change that goes to the very heart of the case.

Id. at 283; See also Absolutely Great Radio, Inc., 2 FCC Rcd 4603, 4603 (1987) [63 RR 2d 710, 712], citing, Greater Boston, supra, and Cleveland Television Corp. v. F.C.C., 732 F.2d 962, 973 (DC Cir., 1974). Remand of a Commission decision is only warranted "if a

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<sup>3</sup> USCC does, however state that the Court of Appeals should be requested to hold the pending appeals in abeyance while the Commission acts on the Petition. Petition at 6, n.4.

manifest injustice would arise from 'misconduct undercutting the integrity of the administrative or judicial process.'" Absolutely Great Radio, Inc. at 712, citing Greater Boston. No such injustice or administrative misconduct exists here. Clearly, USCC seeks only the opportunity improperly to rehash information which has already been provided to, and considered by the Commission. There is simply no basis whatsoever for the Commission to request remand from the Court of Appeals.

## **II. USCC'S PETITION IS AN UNTIMELY PETITION FOR RECONSIDERATION.**

Not only does the Commission lack jurisdiction to act on USCC's Petition, but even if the Commission had jurisdiction, the Petition must be dismissed as untimely. Title 47, Section 405(a) of the United States Code provides an administrative avenue, the petition for reconsideration, for review of Commission decisions, whether issued by the Commission or pursuant to delegated authority. Despite its styling and in its most charitable light, USCC's Petition must be viewed as an untimely petition for reconsideration. Section 405(a) provides:

A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.

47 U.S.C. Section 405(a). The La Star Decision was released on June 15, 1992. Thus, any request for reconsideration of the decision was statutorily required to be filed no later than July 15, 1992. Thus, USCC's Petition is late-filed by almost 7 months.

Timeliness is a factor deserving of considerable weight. The

Commission's rules provide that "extensions of time shall not be routinely granted." 47 C.F.R. Section 1.46(a).<sup>4</sup> Even in cases of petitions for rehearing, which may be filed at any time, an agency "is subject to the requirement of reasonable discretion under which such jurisdiction is 'sparingly exercised.'" Greater Boston at 286, n.36, citing Sprague v. Woll, 122 F.2d 128, 130 (7th Cir.) cert. denied 314 U.S. 669 (1941). In Sprague v. Woll, the court cautioned that such jurisdiction "should be sparingly exercised when reopening is contemplated after a considerable lapse of time." Sprague v. Woll at 130 [request for agency action 9 months after decision, and reopening of matter 5 months thereafter]. Unlike Sprague v. Woll, in this case, USCC does not have the freedom to request Commission action at any time, but must follow a statutory deadline. Accordingly, the Commission should dismiss the Petition as untimely.

### **III. USCC'S PETITION CANNOT BE CONSIDERED A REQUEST FOR DECLARATORY RULING.**

USCC suggests that the Commission might treat the Petition as a request for declaratory ruling. Petition at 6, n.4. In support of this request, USCC claims that "Footnote 3 has no significance for, and may not be construed as having any impact on, any other proceeding before the Commission." Id. USCC's request is simply not a proper subject for declaratory ruling. Section 1.2 of the

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<sup>4</sup> It should be noted that USCC neither requested leave to file its unauthorized Petition from the Commission, nor did it request an extension of time to file.

Commission's rules provides:

The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

47 C.F.R. Section 1.2. In providing a means for declaratory ruling, the Commission envisioned that:

. . . the procedure could be used to resolve controversies between carriers and their customers or controversies among carriers relating to their rights or duties under the Communications Act, under the Commission's Rules, or under prior Commission orders. . .  
An interested person who believes that an unambiguous Commission decision is incorrect, however, should either file a timely petition for reconsideration with this Commission or a timely appeal or petition for review with an appropriate Court of Appeals.

Public Service Commission of Maryland, 6 FCC Rcd 4000 (1989) [66 RR 2d 806, 812]; affirmed, 68 RR 2d 8 (DC Cir., 1990) (emphasis added). In this decision, the Commission warned an applicant who failed to file a petition for reconsideration that it "should not attempt to use a petition for declaratory ruling as a substitute for a petition for reconsideration." Id. USCC's request to treat its Petition as a request for declaratory ruling flies in the face of the Commission's admonition in Public Service Commission of Maryland.

Moreover, USCC had the opportunity to file a petition for reconsideration of the La Star Decision if USCC wished further explication of the meaning or effect of footnote three. However, it chose not to do so. The Commission should decline to permit USCC to utilize an improper procedural vehicle to air its



grievances now.

#### IV. THE NY 4 PROCEEDING AND FOOTNOTE THREE.

USCC's Petition should be dismissed on procedural grounds. The La Star Decision rests squarely at the Court of Appeals as a result of USCC's decision to file a notice of appeal rather than a petition for reconsideration. Simply put, the Court of Appeals, and not the FCC, has jurisdiction over the case.

The remaining question over which the Commission retains jurisdiction is the manner in which the Commission will resolve the footnote three issues raised in the four outstanding proceedings cited by USCC in its Petition. See Petition at 7. In the NY 4 Proceeding, the petitioners focused the Commission's attention upon the relevance of footnote three to improper acts of USCC's parent, Telephone and Data Systems, Inc. ("TDS") in New York 4: TDS has established a pattern of improperly dominating smaller eligible telephone companies as a means to acquire construction permits. In the NY 4 Petition to Deny (filed August 3, 1992), the petitioners demonstrated TDS' improper domination of two smaller, wireline eligible telephone companies as a means to acquire the NY 4 construction permit.

However, the NY 4 Proceeding can be resolved even without delving into footnote three. In the NY 4 Proceeding, the petitioners provided an independent factual basis sufficient to support a finding that the tentative selectee lacks the basic qualifications, due to the blatant Section 22.923(b)(7) false

certification of the New York 4 application by Mr. Griswold.<sup>5</sup> In their Petition to Deny, as well as their Response to Consolidated Reply (filed October 2, 1992), the petitioners clearly demonstrated that an understanding for a settlement existed, which was required to be disclosed under Section 22.923(b)(7). In fact, Mr. Griswold had signed the settlement agreement two days before he certified the New York 4 application.<sup>6</sup> None of these facts was contested.

RTMC urges the Commission to find, on that basis, that the New York 4 tentative selectee is unqualified. If the Commission chooses not to dismiss the application on this ground, RTMC urges the Commission to consider the impact of the tentative selectee's actions in the NY 4 Proceeding in light of footnote three. In this event, the NY 4 Petition and related pleadings should be included in any such review.

#### **V. CONCLUSION.**

USCC's attempts to characterize its protoplasmic Petition to Delete or Nullify the Effect of Footnote Three as either a petition or a request for declaratory ruling should be viewed as a disingenuous attempt to camouflage a late-filed petition for

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<sup>5</sup>In addition, the petitioners have documented several bases for dismissal of the tentative selectee in the NY 4 Proceeding.

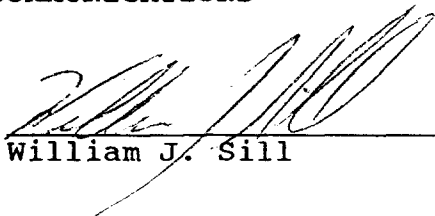
<sup>6</sup> The tentative selectee argued that the settlement agreement was not binding until Telephone and Data Systems, Inc., the parent of USCC, signed the agreement three months later. However, this reasoning completely misses the point, as Section 22.923(b)(7) requires an applicant to certify that there are no agreements or understandings which would provide someone other than the applicant with a direct or indirect ownership interest.

reconsideration. Consideration of the merits of the Petition under any guise would be improper as jurisdiction over the La Star Decision rests squarely with the Court of Appeals. Finally, the Commission should find the tentative selectee in the NY 4 Proceeding to be unqualified due to its false certification pursuant to Section 22.923(b)(7). However, if the Commission deems it necessary to review TDS's actions in NY 4 in the context of footnote 3, dismissal of the tentative selectee is also mandated.

Respectfully Submitted,

ROCHESTER TELEPHONE MOBILE  
COMMUNICATIONS

By:

  
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February 18, 1993

### **Certificate of Service**

I, Marianne H. LePera, do hereby certify that a copy of the foregoing "Motion to Strike" was served this 18th day of February, 1993, via First Class U.S. mail, postage prepaid, upon the following parties:

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